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Supreme Court, U.S.
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No. 96-998

In The

Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,

Petitioner,

vs.

THERESA A. HEURTEBISE,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

ERNEST GOODMAN
Counsel of Record
JULIA SHERWIN
Attorneys for Respondent
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

QUESTIONS PRESENTED

I. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257, where Petitioner has failed to raise any federal question in the courts below, and the Michigan Supreme Court's decision in *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W. 2d 243 (1996), was based on state law, which was both independent of any federal question and adequate to support the judgment?

II. Whether Michigan law does not conflict with, and is not preempted by, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, where arbitration requires a contract under both Michigan and federal law, and no contract existed in this case?

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Appendix B — Affidavit of Christopher R. Holliday . 3a

OPINIONS BELOW

The Michigan Supreme Court's decision is reported at 452 Mich. 405, 550 N.W. 2d 243 (1996).

The Michigan Court of Appeals' decision, which the Michigan Supreme Court reversed, is reported at 207 Mich. App. 308, 523 N.W. 2d 904 (1994).

The trial court's opinion and order denying Defendant-Petitioner's motion to compel arbitration is contained in Plaintiff-Appellant's Appendix in the Michigan Supreme Court, pp. 51a-70a.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review this case under 28 U.S.C. § 1257. Respondent failed to raise any federal question in the courts below, and the Michigan Supreme Court's decision is grounded in Michigan law, which is both independent of federal law and adequate to support the judgment.

STATEMENT OF THE CASE

Respondent Theresa Heurtebise ("Respondent"), began working for Petitioner Reliable Business Computers, Inc. ("Petitioner"), in May 1989. When she began her employment, Ms. Heurtebise received an employee handbook that expressly stated, "None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied." Respondent's Appendix, (hereafter "Resp. App."), at 2a.

The non-contractual employment handbook included a provision requiring binding arbitration of "any dispute, matter

or controversy involving claims of monetary damages and/or employment related matters . . . including any and all claims relating to termination of employment." Pet. App. at A-65 - A-66.

At the time she received the handbook, Ms. Heurtebise was required to sign an "Employee Acknowledgment" form, acknowledging receipt of the employee handbook. The acknowledgment form stated that the employee agreed "to conform to the various procedures, rules and regulations of the company as set forth in the handbook." Pet. App. at A-62.

Petitioner asserts that Respondent's signature on this acknowledgment form constituted an agreement to arbitrate Respondent's civil rights claim. However, arbitration requires a contract, and the very first page of the Employee Handbook makes clear that nothing contained in the handbook is a contract.

Petitioner's Employee Handbook states on page 2:

> **It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied . . .**
>
> **From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant.**

Resp. App. at 1a.

Theresa Heurtebise was discharged from her employment on or about July 20, 1990, after she and a male co-worker

allegedly returned late from lunch. However, Ms. Heurtebise's male co-worker was not discharged. On November 25, 1991, Ms. Heurtebise commenced a sex discrimination lawsuit under Michigan's Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101 *et seq.*, M.S.A. § 3.548(101) *et seq.*, against Petitioner in Wayne County Circuit Court. Appendix, pp. 1a-6a.[1]

In response to the Complaint, Petitioner filed a motion seeking to enforce the handbook arbitration clause under Michigan law. Appendix, pp. 7a-23a.

Pursuant to Michigan Court Rule (MCR) 2.113(F), Petitioner was required to attach "a copy of the instrument [upon which it relies] or its pertinent parts" to its motion. Petitioner did not attach the complete handbook or all of the "pertinent parts" to its motion. Rather, Petitioner submitted only the "Employee Acknowledgment" form and pages 64 through 71 of the Employee Handbook. Appendix, pp. 24a-32a. Page 64 of the submitted portion of the handbook states that none of the policies, practices, or procedures contained therein create a contract. Appendix, p. 25a.

Ms. Heurtebise had misplaced her copy of the employee handbook, and her counsel did not have it to provide to the court. *See* Affidavit of Christopher R. Holliday, Resp. App. at 3a-9a. Petitioner never produced the complete handbook, despite Respondent's proper requests for it.[2]

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1. In this Brief, Respondent will cite to Plaintiff-Appellant's Appendix ("Appendix"), which was filed in the Michigan Supreme Court. Plaintiff-Appellant's Supplemental Appendix filed with that court contains the complete employee handbook.

2. *See* Plaintiff's motion to amend the record in the Michigan Supreme Court, and the Exhibits attached thereto.

At the hearing on Petitioner's motion, Judge Cynthia D. Stephens properly ruled that Petitioner had not met its burden of proving that it was entitled to arbitration, finding: (1) the requirement that employees arbitrate "any and all claims relating to termination of employment" violates public policy; (2) the employee handbook is ambiguous; and (3) the parties did not have a meeting of the minds concerning the alleged agreement to arbitrate claims under the Elliott-Larsen Civil Rights Act. Appendix, pp. 64a-65a.

Judge Stephens accordingly denied Petitioner's motion on April 16, 1992. Appendix, pp. 69a-70a.

Without seeing the complete employee handbook, the Michigan Court of Appeals granted leave to appeal, and reversed the trial court's denial of Petitioner's motion to compel arbitration. *Heurtebise v. Reliable Business Computers, Inc.*, 207 Mich. App. 308, 523 N.W. 2d 904 (1994).

The Michigan Court of Appeals opined: (1) the arbitration provision in the employee handbook is unambiguous; (2) the record does not support the trial court's finding that there was no meeting of the minds concerning the arbitration provision; (3) even if the parties' minds did not meet, "mutual assent to a term of employment is not required;" (4) the "no contract" provision of the employee handbook does not address the handbook in its entirety, but only the at-will employment provisions in the handbook; and (5) public policy does not prohibit enforcement of a "valid arbitration agreement" requiring arbitration of civil rights claims. 207 Mich. App. at 310-311.

The Court of Appeals denied Respondent's motion for rehearing. Respondent then sought leave to appeal to the Michigan Supreme Court on January 24, 1995, which was granted on December 28, 1995.

After briefs were filed in the Michigan Supreme Court, Respondent's counsel received a copy of the entire Employee Handbook from a former employee of Petitioner. **The very first page of the Employee Handbook, which Petitioner never submitted to the lower courts, makes clear that *nothing* contained in the handbook is a contract:**

> It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied . . .
>
> From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant.

Resp. App. at 1a. Accordingly, neither the arbitration provision nor any other provision in Petitioner's handbook is a contract.

The Michigan Supreme Court granted Respondent's motion to amend the record pursuant to MCR 7.316(A)(4). Respondent submitted a supplemental appendix containing Petitioner's complete employee handbook.[3] *See* Plaintiff-Appellant's Supplemental Appendix.

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3. Petitioner complains that the Michigan Supreme Court should not have considered the first page of the employee handbook, because it was not available until the case was in the Michigan Supreme Court. However, the court properly granted Respondent's motion to enlarge the record, to include the complete handbook when Respondent's counsel procured a copy. MCR 7.316(A)(4). Since the Michigan Supreme Court treated the first page of the handbook as an important part of the record, this Court is free to consider it. *Lear, Inc. v. Adkins*, 395 U.S. 653, 657 n. 1, 89 S. Ct. 1902, 1904 n.1, 23 L. Ed. 2d 610 (1969).

On July 16, 1996, the Michigan Supreme Court reversed the decision of the Court of Appeals, because the language on the first page of Petitioner's handbook denied the existence of a contract. 452 Mich. 405 (1996). The Michigan Supreme Court unanimously held:

- (1) It is undisputed that an arbitration agreement is unenforceable if it is not a binding contract;

- (2) Petitioner's language on the first page of the handbook demonstrates that Petitioner did not intend to be bound to any provision contained in the handbook;

- (3) Therefore, the handbook did not create an enforceable arbitration agreement.

452 Mich. at 413-414.

On September 16, 1996, the Michigan Supreme Court denied Petitioner's motion for rehearing. On December 13, 1996, Petitioner filed its Petition for Writ of Certiorari to the Michigan Supreme Court, which contains many misstatements of fact and law, and raises federal issues for the first time in this case.

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Pursuant to Rule 15.2 of this Court, Respondent must illuminate several misstatements of both fact and law in the Petition for Writ of Certiorari.

Petitioner erroneously states, "Plaintiff's counsel had a complete copy of the entire handbook at all times and could have supplied it before the trial, but did not." Petition, p. 3. As

noted in the affidavit of Christopher R. Holliday (Resp. App. at 6a), and Plaintiff-Appellant's motion to amend the record, Ms. Heurtebise had misplaced her copy of the employee handbook. After initial briefs were filed in the Michigan Supreme Court, Respondent's counsel received a copy of the complete employee handbook from another former employee of Petitioner. Resp. App. at 6a.

Petitioner argues that, in granting Respondent's motion to amend the record, the Michigan Supreme Court violated its own court rules on motion practice. Petition at 2. To the contrary, MCR 7.316(A)(4) permits the court to amend the record by adding matters which should have been included.

Petitioner erroneously states that the Michigan Supreme Court refused to enforce the arbitration policy simply because Ms. Heurtebise "asserted an employment discrimination claim under a state statute." Petition at 9, 28. In fact, the Michigan Supreme Court refused to compel Ms. Heurtebise to arbitrate her claim because the court correctly found that no arbitration contract exists in this case.

Petitioner alleges that the Michigan Supreme Court singles out arbitration as a suspect class of contracts, holding arbitration up to a higher standard of contract formation, in violation of Michigan's arbitration statute. Petition at 8, 10, 22. In reality, the Michigan Supreme Court merely followed the well-settled law that arbitration, including statutory arbitration, requires a contract. Based on Petitioner's own statements in its handbook, it is clear that none of the handbook provisions were contractual.

Petitioner further asserts that Respondent's remedies in this case are based on Petitioner's handbook, and the Michigan Supreme Court held other provisions of the employee handbook enforceable, while refusing to enforce the arbitration provision.

Petition at 14, 29. To the contrary, Respondent's rights in this case are based on Michigan law governing employment discrimination claims. The Michigan Supreme Court did not enforce *any* provision of the handbook, as it found that "the defendant did not intend to be bound to *any* provision contained in the handbook." 452 Mich. at 414 (emphasis added).

Petitioner asserts that the decision below conflicts with state law, and must therefore be vacated. Petition at 21-23. As noted *infra*, the Michigan Supreme Court's decision was consistent with both Michigan and federal law. Furthermore, even if the decision conflicted with Michigan law, this Court could not vacate it as "conflict preempted."

Petitioner boldly asserts: "Even an agreement to arbitrate discrimination claims allegedly *unilaterally imposed by the employer as a condition of employment* is enforceable under the statute." Petition at 17 (emphasis in original). As discussed *infra*, arbitration under both the Michigan Arbitration Act (MAA), M.C.L. § 600.5001(2), M.S.A. § 27A.5001(2), *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, require mutuality of assent, and arbitration cannot be unilaterally imposed by one party on another party.

Finally, Petitioner repeatedly, falsely asserts that it properly raised the issues of federal preemption and the Federal Arbitration Act's application to this case in the state courts. *See, e.g.*, Petition at 4, 6, 9-10. In fact, Petitioner never discussed any federal issue until it filed its brief in the Michigan Supreme Court. *See* § I(B), *infra.*

Because this Court lacks jurisdiction over this case under 28 U.S.C. § 1257, and the Michigan Supreme Court's decision does not conflict with any federal law, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1257, BECAUSE PETITIONER FAILED TO RAISE ANY FEDERAL QUESTION IN THE COURTS BELOW, AND THE MICHIGAN SUPREME COURT'S DECISION WAS BASED ON STATE LAW, WHICH WAS BOTH INDEPENDENT OF ANY FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT.

A. Petitioner *Never* Raised the Equal Protection Clause or the Contract Clause of the United States Constitution in the Lower Courts.

This Court will not decide federal constitutional issues which are raised for the first time in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992); *Webb v. Webb*, 451 U.S. 493, 499, 101 S. Ct. 1889, 1893, 68 L. Ed. 2d 392 (1981); *Monks v. New Jersey*, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970).

In its Petition for Writ of Certiorari, Petitioner raises federal Equal Protection and Contract Clause claims for the very first time. United States Constitution, Am. XIV, §1, United States Constitution, Art. I, § 10. Petitioner's Equal Protection and Contract Clause claims were never even mentioned in the courts below, and they are not properly before this Court.

Even if Petitioner's Equal Protection and Contract Clause claims were properly before this Court, those claims would have no merit. The Michigan Supreme Court in this case merely decided that (1) arbitration requires a contract, and (2) there

was no arbitration contract in this case. This decision makes no classification in violation of the Equal Protection Clause, and it does not impair the enforcement of any contracts.

B. Petitioner Failed to Raise the Federal Arbitration Act or Federal Preemption in the Lower Courts.

"At the minimum, . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the **state** law." *Webb*, 451 U.S. at 501, 101 S. Ct. at 1894 (emphasis added and emphasis in original).

Contrary to Petitioner's assertions in its petition, it did not raise the issues of (1) federal preemption, or (2) the applicability of the Federal Arbitration Act to this case, in the lower courts.

Throughout its motion and brief in the trial court, Petitioner sought to enforce its arbitration provision under "the Michigan Uniform Arbitration Act, M.C.L. § 600.5001 *et seq.* and Michigan Common Law." Appendix, pp. 8a. Petitioner never even mentioned the FAA. Appendix at 7a-36a.

In the appellate courts, Petitioner continued its reliance on Michigan law. However, Petitioner began to discuss *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), as a federal case on an "analogous" question to the case at bar.

Petitioner mentioned the FAA only as it discussed the facts of *Gilmer* in its briefs in the Michigan Court of Appeals and the Michigan Supreme Court. In *Gilmer*, the plaintiff registered as a securities broker with the New York Stock Exchange (NYSE).

His securities registration application and NYSE rules required arbitration of any claims between a registered representative and a member organization arising out of the termination of employment. 111 S. Ct. at 1650-1651. Mr. Gilmer was discharged from his employment, at the age of 62, and subsequently filed a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. This Court found, pursuant to the FAA, that the arbitration agreement in the registration application compelled Mr. Gilmer to arbitrate his age discrimination claim.

However, this Court expressly limited its holding to the facts in *Gilmer*. This Court noted that § 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce." 111 S. Ct. at 1651-1652 n.2. This Court explicitly observed that the arbitration agreement in *Gilmer* was ***not*** contained in a contract of employment. The agreement was contained in a securities registration application, which was a contract with the securities exchanges, ***not*** with Mr. Gilmer's employer.[4]

While *Gilmer* was decided under the FAA, Petitioner in this case did ***not*** argue that the FAA applied here. Rather, Petitioner relied on Michigan law, and the Michigan Arbitration Act. Indeed, in its brief in the Michigan Court of Appeals, Petitioner argued that the FAA's exclusion for employment contracts "is not an issue in the case at bar since the Michigan UAA [Uniform Arbitration Act] does not have an exception for employment contracts as in the FAA." Defendant's Brief on Appeal, Michigan Court of Appeals, p. 28, n.6.

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4. While no arbitration agreement exists in this case, if there were such an agreement, it would be contained in a contract of employment, to which *Gilmer* and the FAA would not apply.

Petitioner did not even *mention* federal preemption, or assert that the FAA applied to this case, until it filed its Brief on Appeal in the Michigan Supreme Court. In that brief, Petitioner stated in a footnote:

> Construing the MAA [Michigan Arbitration Act] as limiting arbitration to certain types of claims would also run afoul of the doctrine of federal preemption under the Federal Arbitration Act, 9 U.S.C. §§ 1-5, ("FAA"). The FAA states an overriding federal mandate for broad construction of arbitration agreements that prohibits states [sic] statutes or court decisions that might limit arbitration agreements.

Defendant-Appellant's Brief on Appeal, Michigan Supreme Court, p. 12, n.6.

Petitioner only squarely raised the FAA and federal preemption in its motion for rehearing in the Michigan Supreme Court. That motion was denied without comment.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495, 101 S. Ct. 1889, 1891, 68 L. Ed. 2d 392 (1981). Petitioner cannot make such a showing here.

In *Board of Directors of Rotary Int'l. v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), the appellants, like Petitioner in the case at bar, did not present federal constitutional issues squarely to the state courts until

their petition for rehearing with the Court of Appeals, which denied the appellant's petition without opinion. This Court held that the appellants failed to show that they adequately presented the federal issues to the state courts. 481 U.S. at 550, 107 S. Ct. at 1948.

In the present case, Petitioner did not squarely present the issue of federal preemption until it filed its motion for rehearing with the Michigan Supreme Court. The Michigan Supreme Court denied Petitioner's motion without opinion, and Petitioner cannot show that it properly presented the issue below.

Under Michigan law, by the time Petitioner raised federal issues for the first time in its motion for rehearing, those issues had not been preserved for appeal, and were therefore not properly before the Michigan Supreme Court. *Hess v. West Bloomfield Twp.*, 439 Mich. 550, 557 n.6, 486 N.W. 2d 628 (1992) (preemption issue which was not raised in the trial court was not preserved for review by the Michigan Supreme Court). This Court therefore should deny certiorari. *Webb* and *Rotary*, *supra. See also Clark v. Jeter*, 486 U.S. 456, 459-460, 108 S. Ct. 1910, 1913-1914, 100 L. Ed. 2d 465 (1988) (this Court will not review issue of federal preemption of state law when petitioner did not expressly assert that state law was preempted in state court).

Given Petitioner's failure to present any federal question in the lower courts, this Court should deny the Petition for Writ of Certiorari.

C. The Michigan Supreme Court's Decision Was Based on State Law, which Is Both Independent of Federal Law and Adequate to Support the Judgment.

Even if Petitioner had properly presented a federal question

in the lower courts, this Court would have no jurisdiction over this case. This Court has no jurisdiction to review a state court judgment which is based on state law that is "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-2554, 115 L. Ed. 2d 640 (1991), *reh. denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991).

When this Court reviews a state court decision pursuant to 28 U.S.C. § 1257, it is reviewing a judgment. If resolution of the federal question cannot affect the judgment, "there is nothing for the Court to do." 501 U.S. 730, 111 S. Ct. 2554.

In the case at bar, this Court's resolution of any federal question cannot affect the judgment of the Michigan Supreme Court for two reasons. First, the Michigan Supreme Court properly found that, under Michigan law, arbitration requires a contract, and Petitioner's employment handbook expressly stated that nothing in it was a contract. Second, as discussed in Point II, *infra*, even under the FAA, arbitration requires a contract, and Petitioner's handbook does not meet that requirement.

1. Arbitration Requires a Contract, Which Cannot Be Unilaterally Imposed on Employees.

It is well settled in Michigan that arbitration requires a contract. *Arrow Overall Supply Co. v. Peloquin Enterprises*, 414 Mich. 95, 98, 323 N.W. 2d 1 (1982); *Ehresman v. Bultnyck & Co.*, 203 Mich. App. 350, 353-354, 511 N.W. 2d 724 (1994). The Michigan Supreme Court therefore properly held that "an arbitration provision is unenforceable if it is not a binding contract." *Heurtebise*, 452 Mich. at 413.

Before ordering a party to arbitration, courts must first determine whether a valid arbitration contract exists. " 'The

determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles.' " *Horn v. Cooke*, 118 Mich. App. 740, 744-745, 325 N.W. 2d 558 (1982) (citations omitted).

Petitioner's assertion that an arbitration agreement under the Michigan Arbitration Act need only be an "instrument in writing" provides it no help. Petition, p. 22. The "instrument in writing," in order to be an enforceable arbitration agreement under the Michigan Arbitration Act, must be a contract. M.C.L. § 600.5001(2), M.S.A. § 27A.5001(2).

Petitioner also incorrectly asserts that it may unilaterally impose arbitration on its employees. "Contractual liability is consensual. A basic requirement of contract formation is that the parties mutually agree to be bound." *Rood v. General Dynamics Corp.*, 444 Mich. 107, 118, 507 N.W. 2d 591 (1993). "No contract to arbitrate can arise except upon the expressed mutual assent of the parties." *Horn*, 118 Mich. App. at 744-745.

The Michigan Supreme Court correctly held that arbitration requires a contract.

2. The Michigan Supreme Court Properly Held that Petitioner's Employee Handbook Was NOT a Contract.

In the case at bar, the opening statement of Petitioner's employee handbook states:

> It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied. . . .
>
> From time to time, the COMPANY

> specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant.

Resp. App. at 1a. In addition, the handbook contains similar language denying the existence of a contract on page 64:

> None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied.

Resp. App. at 2a.

The Michigan Supreme Court properly held, regardless of the employee acknowledgment form signed by Ms. Heurtebise, that the language on the first page of the employee handbook meant what it said — "the defendant did not intend to be bound by any provision contained in the handbook." 452 Mich. at 414.

Petitioner now asserts that its language denying the existence of any contract, express or implied, was merely an "at-will disclaimer" denying only the existence of a contract to discharge for cause.

However, courts "follow the objective theory of assent, focusing on how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct." *Rood* at 119. In the case at bar, Petitioner's handbook stated that its policies did not create any contract, and ***none*** of its policies, practices, procedures or other matters created any contract. Resp. App. at 1a-2a.

Petitioner essentially seeks to bind its employees to an

arbitration provision in its employee handbook, while itself remaining free of any contractual obligation under any provision in the handbook. However, Petitioner's requested interpretation of its handbook lacks mutuality:

> A contract lacks mutuality when one party is obligated to perform, but not the other. . . . Where a contract obligates only one party to perform, while exempting the other party from any obligation to do so, it lacks mutuality and is void for want of consideration. *Commercial Movie Rental v. Larry Eagle, Inc.*, 738 F.Supp. 227, 229-230 (W.D. Mich 1989).

The Michigan Supreme Court correctly concluded that nothing in Petitioner's handbook was a contract.

3. Petitioner Improperly Asks this Court to Review Questions of State Law, and Incorrectly Interprets State Law.

Petitioner asks this Court to grant a writ of certiorari, because the Michigan Supreme Court's decision allegedly contradicts Michigan statutory and common law. However, "[i]nterpretations of state law by a State's highest court are, of course, binding upon this Court." *California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 856, 102 L. Ed. 2d 957 (1989). In addition, the Michigan Supreme Court's decision is consistent with Michigan law.

Petitioner incorrectly asserts that, under *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W. 2d 880 (1980), Petitioner may unilaterally impose arbitration on its employees by including an arbitration policy in its non-contractual employment handbook.

In *Toussaint*, the Michigan Supreme Court held generally that (1) an employer may enter into a **contract** with its employees to terminate the employment only for cause; and (2) an employer's 'just cause termination' statements in employment handbooks may create **"legitimate expectations"** in its employees that they will only be discharged for cause, making the policy statements enforceable against the employer. 408 Mich. at 610, 613-614. The parties need not mutually agree for these handbook provisions to bind the employer. 408 Mich. at 614-615.

If an employer imposes upon itself a policy to discharge for cause only, the court in *Toussaint* observed that the employer could avoid jury review of a wrongful discharge case under that agreement by providing for binding arbitration. 408 Mich. at 624. *See also, Renny v. Port Huron Hospital*, 427 Mich. 415, 439-430, 432, 398 N.W. 2d 327 (1986). When an employer bestows the benefit of a just-cause employment relationship upon its employees, the employer has the right to determine the forum in which employees' claims under the just-cause policy may be heard. 408 Mich. at 624.

Petitioner argues that mutual assent to an arbitration contract in this case was not required, relying on the "legitimate expectations" leg of *Toussaint* and its progeny. However, the very first page of Petitioner's Employee Handbook negates any application of the *Toussaint* legitimate expectations analysis in this case. Petitioner's handbook states: **"From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant."** Resp. App. at 1a.

Under *Toussaint*, an employer's statement that its personnel policies are subject to unilateral change by the employer prevents

employees from relying on the legitimate expectations analysis. "Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force." *Toussaint*, 408 Mich. at 619; *In re: Certified Question, Bankey v. Storer Broadcasting Company*, 432 Mich. 438, 453, 443 N.W. 2d 112 (1989).

Moreover, *Toussaint* "legitimate expectations" analysis does not apply to arbitration agreements. Arbitration is a matter of contract, and the legitimate expectations analysis operates *outside* contract law.

Indeed, the Michigan Supreme Court has repeatedly emphasized that the "legitimate expectations" leg of *Toussaint* does not involve traditional contract law. *Dumas v. Auto Club Ins. Ass'n.*, 437 Mich. 521, 529 n.4, 531, 473 N.W. 2d 652 (1991); *Rood, supra*, 444 Mich. at 13 ("the legitimate expectations theory of *Toussaint* is not based on traditional contract analysis"); *In Re: Certified Question*, 432 Mich. at 453 (the enforceability of written personnel policies under the legitimate expectations leg of *Toussaint* is not based on traditional contract law); *Carlson v. Hutzel Corp. of Michigan*, 183 Mich. App. 508, 513, 455 N.W. 2d 335 (1990).

Furthermore, the legitimate expectations analysis only applies to claims for wrongful discharge based on employment handbooks. In *Dumas*, Justice Riley observed that *Toussaint* should not be extended " 'beyond wrongful discharge into every facet of the employment relationship. . . . [I]t would be prudent and wise to leave to the Legislature the public policy decision whether, or to what extent, *Toussaint* should be extended beyond wrongful discharge.' " 437 Mich. at 532 (citation omitted). In

Dumas, the Michigan Supreme Court refused to apply legitimate expectations analysis to an alleged promise to freeze renewal commissions. Such a promise must be tested under traditional contract principles, which require an objective manifestation of mutual assent. 437 Mich. at 542.

In the case at bar, Respondent's claim is a civil rights claim, which is independent of Petitioner's employment handbook. An arbitration policy is, of course, not a wrongful discharge claim, and *Toussaint* does not make Petitioner's policy enforceable.

In addition, handbook "policies" like Petitioner's arbitration policy, are not contracts, especially where the employer explicitly denies the existence of a contract. In *Rowe v. Montgomery Ward*, 437 Mich. 627, 645-646, 473 N.W. 2d 268 (1991), the Michigan Supreme Court distinguished "policy" language from contractual language: "Harryman's words were couched in general terms, more akin to stating a policy as opposed to offering an express contract." **"A 'policy' is commonly understood to denote a flexible framework for operational guidance, and not a perpetually binding contractual obligation."** *In Re: Certified Question*, 432 Mich. at 456.

In support of its position, Petitioner cites *Scholz v. Montgomery Ward & Co.*, 437 Mich. 83, 468 N.W. 2d 845 (1991), a wrongful discharge breach of contract case. The court in *Scholz* stated that the "sole issue" in that case was whether the plaintiff had a contract not to be discharged for refusing to work Sundays. 437 Mich. at 85-86.

In *Scholz*, the plaintiff argued that her employer agreed not to make her work Sundays. The employer issued a new handbook setting forth an at-will policy, and had the plaintiff execute a sign-off sheet. The Michigan Supreme Court held that, even

assuming the plaintiff had an earlier contract not to be discharged for refusing to work Sundays, the sign-off sheet qualified as an enforceable written modification of that contract. *Id.* at 86, 90 n.7, 93. **In this case, the handbook itself provides that no arbitration or other contract exists.** Plaintiff's signature on an Employee Acknowledgment form did not create any contract.

Petitioner's clear purpose in employing language denying the existence of any contract and reserving the right to unilaterally modify the handbook provisions was to avoid application of *Toussaint* and its progeny to ***any*** of the handbook provisions. Petitioner cannot be permitted to avoid application of *Toussaint* liability, and at the same time apply *Toussaint* to restrict its employees' civil rights, which are independent of any of Petitioner's employment policies.

The Michigan Supreme Court correctly decided on independent and adequate state law grounds that no arbitration contract existed in this case. The Petition for Writ of Certiorari should be denied.

II.

EVEN IF THE FEDERAL ARBITRATION ACT APPLIED TO THIS CASE, THERE IS NO CONFLICT PREEMPTION, AND THIS COURT SHOULD NOT REVIEW THE MICHIGAN SUPREME COURT'S DECISION.

A. The Federal Arbitration Act Requires a Contract.

Even if the Federal Arbitration Act applied to this case, the Michigan Supreme Court's decision was consistent with the Act. The Federal Arbitration Act requires that an arbitration provision be in a ***contract*** to be enforceable. 9 U.S.C. § 2.

Furthermore, this Court has made clear that the federal policy in favor of arbitration does not mandate arbitration where no arbitration contract exists. In *Volt Information Sciences v. Board of Trustees of Stanford University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), this Court noted that the thrust of the Federal Arbitration Act is that "arbitration is strictly a matter of contract." 489 U.S. at 472, 109 S. Ct. at 1252.

In *Volt*, this Court held that a California law permitting a court to stay arbitration proceedings pending the resolution of related litigation was ***not*** preempted by the FAA. The FAA contains no express preemption provision. 489 U.S. at 477, 109 S. Ct. at 1255.

Rather, state law will be preempted by the FAA if it actually conflicts with the FAA " — that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt*, 489 U.S. at 477, 109 S. Ct. at 1255. The Michigan Supreme Court's decision in this case furthers, rather than conflicts with, the goals of the FAA. Conflict preemption is inapplicable to this case.

B. The Goals and Policies of the FAA Are Furthered, Rather than Undermined, by the Michigan Supreme Court's Decision.

"The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other ***contracts***." *Volt*, 489 U.S. at 478, 109 S. Ct. at 1255 (emphasis added, citations omitted). *See also, Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, __ U.S. __, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995) (the basic purpose of the FAA is to "overcome courts' refusal to enforce agreements to arbitrate").

However, the FAA was not intended to allow one party to force arbitration on another party in the absence of a contract. As noted by the Court in *Volt*:

> **[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so. . . . *the Act was designed to make arbitration agreements as enforceable as other contracts, but not more so.***

Volt, 489 U.S. at 478, 109 S. Ct. at 1255 (emphasis added).

Petitioner incorrectly asserts that arbitration "agreements" which are unilaterally imposed on employees by their employers are enforceable under the FAA. Petition at 17. As stated above, arbitration requires a contract, which requires ***mutual*** assent to be binding. Furthermore, this Court has made clear that **"Arbitration under the Act is a matter of consent, not coercion."** *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256.

The Michigan Supreme Court correctly found, based upon Petitioner's own words in its handbook, that no arbitration contract existed in this case under Michigan law. Even under the FAA, the question whether an arbitration contract exists is generally governed by state law. *First Options of Chicago, Inc. v. Kaplan*, __ U.S. __, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 485 (1995).

The Michigan Supreme Court, in refusing to order a claim to arbitration where the parties did not have an arbitration contract, furthered the policies of the FAA. There is no conflict with the FAA, and there can be no preemption.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ERNEST GOODMAN
Counsel of Record
JULIA SHERWIN
Attorneys for Respondent
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

APPENDIX A — EXCERPTS FROM EMPLOYEE HANDBOOK

INTRODUCTION

This document is intended to establish and clarify certain employment policies, practices, rules and regulations (hereinafter collectively referred to as "Policies") of RELIABLE BUSINESS COMPUTER, INC., (hereinafter referred to as the "COMPANY"). Except as may otherwise be provided, the Policies will apply to all COMPANY employees, and it is each employee's responsibility to assure that his/her own conduct is in conformity with those Policies. It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied, nor is it intended nor expected that the information provided in this document will provide sufficient detail to answer any and all questions which may arise. *NOTWITHSTANDING ANY OF THE SPECIFIC POLICIES HEREIN, EACH EMPLOYEE HAS THE ABSOLUTE RIGHT TO TERMINATE HIS/HER OWN EMPLOYMENT AT ANY TIME, WITHOUT NOTICE, AND FOR ANY REASON WHATSOEVER, AND THE COMPANY HAS THE SAME RIGHT.*

From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant. In the event employees have any questions relative to any of the Policies, they are urged to contact their supervisor for clarification purposes.

* * *

The Policies set forth in this handbook are currently in effect and apply to all Full Time, Part Time and Temporary employees, except as may be specifically provided. Additional policies, practices, rules and regulations applicable to specified employees only, may be more restrictive than the Policies set forth herein.

Appendix A

Interpretations of the Policies and exceptions, if any, shall only be made in writing by the Executive Committee or such other employees as may be specifically designated by management. Accordingly, no individual employee has authority to make representations, promises or statements contrary to or different from the provisions herein, except the President, and only in a duly executed written document.

All current COMPANY employees will receive a copy of this document. New employees will receive a copy of this document at the time of formal hire. Upon receipt, all employees will sign the Employee Acknowledgement, acknowledging receipt of this document.

* * *

VII.

TERMINATION AND DISMISSAL

GENERAL

As indicated earlier, an employee's employment and compensation may be terminated with or without cause, with or without advance notice at any time, at the option of either the employee or the COMPANY. No employees of the COMPANY except the President, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, or to make any arrangement with employee contrary to, or different from the provisions set forth in this handbook. None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied.

APPENDIX B — AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY

IN THE SUPREME COURT

Appeal from the Court of Appeals

Docket No. 102109
Court of Appeals No. 152041
Lower Court No. 91 131 165 CZ

THERESA A. HEURTEBISE,

Plaintiff-Appellant,

vs.

RELIABLE BUSINESS COMPUTERS INC., A Michigan Corporation,

Defendant/Appellee.

CHRISTOPHER R. HOLLIDAY (P-39173)
JULIA SHERWIN (P-50992)
Attorneys for Plaintiff-Appellant
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

ALAN M. KANTER (P-30221)
Attorney for Defendant-Appellee
4190 Telegraph Road, Ste. 3000
Bloomfield Hills, Michigan 48302
(810) 644-2800

Appendix B

JOHNATHAN T. Walton (P-32969)
Co-Counsel for Def.-Appellee
1515 Penobscott Building
Detroit, Michigan 48226
(313) 963-8989

AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

CHRISTOPHER R. HOLLIDAY, being first duly sworn, deposes and says as follows:

1. I am an attorney of record for the Plaintiff in the above-captioned lawsuit.

2. Plaintiff commenced her lawsuit on November 25, 1991.

3. On December 13, 1991, Plaintiff, through her then-counsel, Niels Eric Hanson, served a request for production of documents on Defendant, which requested, among other items:

> 8. Any and all company handbooks, policy and procedure manuals, rules, and any other documents relating to Reliable's procedures and standards for discipline, layoff and termination, including, but not limited to, manuals available to employees and also those available only to supervisory and/or management personnel.

Appendix B

9. Copies of all personnel policies and policy manuals, for Reliable's managers and employees:

(a) Currently in effect; and

(b) Which were in effect between May, 1989 and July, 1990.

Exhibit A, p.6.

4. On December 19, 1991, Defendant moved to compel arbitration of Plaintiff's civil rights claim, based upon language in Defendant's Employee Handbook.

5. Defendant did not provide its entire Employee Handbook in support of its motion. Importantly, Defendant omitted the first page of the handbook, which page makes clear that nothing in the handbook, including the arbitration provision, is a contract.

6. I assumed representation of the Plaintiff in this matter in March 1992, after Plaintiff's previous attorney withdrew due to a conflict of interest.

7. Defendant's Motion to Dismiss or Alternatively to Compel Arbitration was argued before the Court, Judge Cynthia Stephens presiding, on April 10, 1992.

8. Defendant's Motion was denied.

9. Defendant sought interlocutory leave to appeal on May 6, 1992.

10. In September 1992, I twice asked Defendant, through its counsel, to provide the previously requested discovery, which included Defendant's Employee Handbook. **Exhibit B; Exhibit C.**

11. Despite a promise to provide the requested discovery, Defendant failed to do so.

12. Defendant has never produced its complete Employee Handbook, and has only provided the last eight pages of the handbook, and an Employee Acknowledgement form.

13. My client, Theresa Heurtebise, misplaced her copy of the employee handbook, and has been unable to locate it throughout this litigation.

14. On March 20, 1996, my associate, Julia Sherwin, obtained a copy of Defendant's Employee Handbook from a former employee of Reliable Business Computers, Inc., who also said that the handbook had been involved in a lawsuit in Wayne County Circuit Court in which he was also involved. Ms. Sherwin searched the court records and obtained a certified copy of the Second Amended Complaint in that case. A complete copy of the handbook was attached to that Complaint. The Complaint with handbooks is attached to Plaintiff-Appellant's Motion to Amend Record as **Exhibit D.**

15. A copy of that Handbook has been incorporated in Plaintiff-Appellant's Supplementary Appendix. The text at p. 2 of that Handbook shows clearly that this document is directly and materially relevant to Defendant's claims in this matter and should have been made a part of this record.

Appendix B

16. The matters set forth in this Affidavit are based on my own personal knowledge and if called upon to testify concerning them, I am both competent and willing to do so.

Further, Affiant sayeth not.

s/ CHRISTOPHER R. HOLLIDAY

Subscribed and sworn to before
me this 29th day of March, 1996.

s/ CAROL J. MORIN
Notary Public, Wayne County, MI
My Commission Expires: 9/23/00

Appendix B

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Docket No. 102109
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Attorneys for Plaintiff-Appellant
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

ALAN M. KANTER (P-30221)
Attorney for Defendant-Appellee
4190 Telegraph Road, Ste. 3000
Bloomfield Hills, Michigan 48302
(810) 644-2800

Appendix B

JOHNATHAN T. WALTON (P-32969)
Co-Counsel for Def.-Appellee
1515 Penobscott Building
Detroit, Michigan 48226
(313) 963-8989

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

LINDA S. HALLER, being first duly sworn, deposes and states that she is employed by the Law Firm of GOODMAN, EDEN, MILLENDER & BEDROSIAN, and during the course of said employment, she served a copy of **AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY** upon:

MICHAEL L. GELLER
4109 Telegraph Road
Suite 3000
Bloomfield Hills, MI 48302

JONATHAN T. WALTON
1515 Penobscot Bldg.
Detroit, MI 48226

by placing same in an envelope addressed to the above individuals, bearing a return address and sufficient pre-paid postage thereon and by depositing same in the United States mail on April 1, 1996.

s/ LINDA S. HALLER

Subscribed and sworn to before
me this 1st day of April, 1996.

s/ CAROL J. MORIN
Notary Public, Wayne County, MI
My Commission Expires: 9/23/00